

duIN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1849 of 2006

With

CRIMINAL MISC.APPLICATION No. 12172 of 2006

In

CRIMINAL APPEAL No. 1849 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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ARJANBHAI PUNABHAI MAKWANA - Appellant(s)

Versus

STATE OF GUJARAT - Opponent(s)

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Appearance :

MR HARSHAD K PATEL for Appellant(s) : 1 in both matters

MR RC KODEKAR, APP for Opponent(s) : 1 in both matters

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE MD SHAH**Date : 04/12/2006****COMMON ORAL JUDGMENT****(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)**

- 1.This appeal under Sec.374(2) of the Code of Criminal Procedure has been filed by the appellant who has been charged and tried for the offences punishable under Secs.302 and 307 of Indian Penal Code in Sessions Case No.96 of 2005 wherein he was convicted to suffer imprisonment for life and fine of Rs.3,000/-, in default, to suffer rigorous imprisonment for one year for the offence under Sec.302 and to suffer R.I. for ten years and a fine of Rs.2,000/-, in default, to suffer rigorous imprisonment of six months for the offence punishable under Sec.307 of IPC, by the learned Additional Sessions Judge, Junagadh, by the judgment and order dated 7-9-2006.
- 2.The case of the prosecution in short is that the complaint has been filed by the complainant Savitaben inter alia alleging that she had married with one Narshi Bachu and out of their

wedlock, they had a son named Ramesh. Due to some disputes, she left her husband and remarried with the present appellant and she along with her son Ramesh aged 10 years were staying along with the present appellant. The complainant had two sons and two daughters out of the wedlock of the complainant with the present appellant and all were residing together with the appellant and the complainant. It is further the case that before one year of the incident, there was a quarrel between the appellant and the son of the complainant Ramesh and the appellant was asking Ramesh to go and stay with his real father. On 23-8-2005, when appellant told Ramesh to go to his father, Ramesh refused as he liked to live with his mother and hence, at about 2.00 a.m., when Ramesh was asleep, the appellant poured kerosene on him and set on fire. When the complainant was trying to save Ramesh, the appellant was telling that he would finish both of them. Since the complainant raised an alarm, neighbours came there and took the

complainant and the victim to the hospital. The victim was pronounced death on reaching hospital. The complaint was registered before Junagadh City "B" Division Police Station as C.R.No.I-341 of 2005 for the offence punishable under Secs.302 and 307 of IPC. The police therefore started investigation and during the course of investigation, recorded statements of various witnesses and accused was arrested. The police drew panchnama of scene of offence, panchnama of the body of the accused, panchnama of discovery of muddamal and also inquest panchnama. As the victim succumbed to the injuries, the police made arrangements for sending the body of the victim for post mortem. Muddamal was also sent for opinion of FSL expert. On arrival of post mortem and FSL reports, same were kept with the investigation papers. At the end of investigation, charge sheet was submitted into the Court of learned Second Judicial Magistrate (First Class), Junagadh. As the offence was exclusively triable by Court of Sessions, learned

Magistrate committed the case to the Court of Sessions where it was numbered as Sessions Case No.96 of 2005. Learned Addl. Sessions Judge, Junagadh, framed charge at Ex.1 against the accused. The charge was read over and explained to the accused. The accused pleaded not guilty to the charge and prayed for trial.

3.To prove the charge against the accused, prosecution examined in all 19 witnesses and also placed reliance upon various documentary evidences. On submission of closing purshis by the prosecution, learned Addl. Sessions Judge recorded further statement of the accused under Sec.313 of Cr.P.C. qua the incriminating question wherein the accused came out with the case of total denial. The accused did not examine any witness nor stepped into the witness box. Therefore, after hearing the learned counsel appearing for the respective parties, learned Addl. Sessions Judge delivered the aforesaid judgment and order which is giving rise to prefer the present appeal.

4.When this appeal came up for admission hearing,

at the joint desire of the learned counsel appearing for the respective parties, we have called for the record and proceedings and have heard learned counsel for the appellant, Mr.H.K.Patel and learned APP, Mr.R.C.Kodekar, for the respondent-State at length. MR.Patel has argued the matter on going through the record available with him along with the record and proceedings called for by us.

5.It is mainly argued by Mr.Patel that the appellant is innocent and has not committed any offence. There is no evidence to connect the appellant with the crime in question either. He has taken us through the evidence of complainant, Savitaben, who is the injured eye witness and wife of the appellant and contended that she is also not the eye witness to the incident and she has not involved the accused with the crime in question. He has also taken us through the evidence of other persons who went to the scene of offence at the earliest and who are neighbours and relatives of the appellant. Showing us the evidence of

afore referred witnesses namely, Lakhabhai Rambhai, P.W.No.9 Ex.26, it is contended that he is the cousin brother of victim and the person who took the victim and his mother Savitaben to the hospital in an autorickshaw and he does not support the say of the prosecution. He has also taken us through the evidence of Govindbhai Danabhai, P.W.No.13 Ex.34, who is also the neighbour of the accused and he has also not supported the say of the prosecution. He has further taken us through the evidence of Ajay Raghavbhai, P.W.No.14 Ex.35 and contended that he is also the neighbour and has not supported the say of the prosecution. Bodubhai Jumabhai Malek, P.W.16 Ex.41, who is also a neighbour has not supported the say of the prosecution. Except the complainant, above referred witnesses whom prosecution has cited as witnesses and who reached the scene of offence at the earliest have not supported the say of the prosecution and, therefore, it is requested that it is a matter which requires consideration. He has

also taken us through the evidence of Executive Magistrate, Pithabhai Rambhai Bhatt, P.W.No.10 Ex.28 and also through two endorsements made by the doctor who was discharging his duty in the ward where victim was admitted at Ex.30 and contended that at the time of recording the dying declaration, victim was not conscious at all and, therefore, say of the doctor and Executive Magistrate should not be believed by the court in view of nature of injury received by the deceased and also the evidence on record. Taking us through the relevant discussion on the point of dying declaration and other aspects of the matter, he has argued that this matter requires consideration. Lastly, he has concentrated his arguments on the point of sentence and submitted that some leniency should be shown to the appellant as regards sentence. He has relied upon the case of Laxman Vs. State of Maharashtra, (2002) 6 Supreme Court Cases 710 towards head note "D" which reads as under:

"D. Evidence Act, 1872—S.32—Dying declaration—

Doctor's certificate regarding the declarant's condition—Interpretation of—Where the medical certificate indicated that the declarant was conscious, held, it was indeed a hypertechnical view to say there was no certification as to fitness of state of mind of the declarant—More so when the fitness of the declarant's state of mind was proved by the testimony of the Magistrate who had recorded the dying declaration".

6.Learned APP, Mr.Kodekar, however, has assailed the judgment and order of conviction delivered by the court below and submitted that this appeal does not require any consideration and is required to be dismissed at this stage.

7.We have gone through the evidence which have been shown to us by the learned counsel for the appellant. It is established from the evidence on record and from the well reasoned judgment delivered by the court below that the complaint by Savitaben, wife of the appellant and mother of the victim at Ex.21, has been lodged at the earliest opportunity. The said complaint discloses all the facts about the incident along with the role alleged to have been played by the appellant accused. The injury received by the complainant has been proved through the

evidence of Dr.Nikhilrai Pushkarrai Buch, P.W.No.5 Ex.16, who has examined Savitaben and also through the history given by her and OPD case papers Exs.18 and 19. The complaint has been proved through the evidence of the complainant Savitaben who has also been examined as P.W.No.6 at Ex.20. She has fully supported the case of the prosecution and the facts which has been narrated in her complaint. However, nothing has come out in her cross examination so as to shake her evidence. Much reliance has been placed by the prosecution on the evidence of Executive Magistrate, P.W.10 Ex.28. He has categorically deposed that he received yadi Ex.29 for recording the dying declaration of victim on 23-8-2005 and on receiving the same, he has made endorsement and proceeded to the hospital where he has contacted the doctor who was on duty and obtained endorsement regarding capability of the victim to record the dying declaration. The doctor has clearly made endorsement on the dying declaration by stating that he has taken

all required steps and sent all the interested persons including the relatives, police, etc. outside the ward and recorded the dying declaration of the victim in question and answer form. After completion of dying declaration which he has recorded from 3.40 a.m. and completed at 4.10 a.m., he has obtained endorsement of the doctor regarding consciousness of the victim patient in giving the dying declaration. He has also proved the dying declaration Ex.30.

8. We have gone through the dying declaration in detail. To question No.3 as to what happened to him, the accused has replied that in between 2.00 a.m. and 2.30 a.m. in his own house, while he was sleeping, his step father has done all these things. When question was asked regarding the incident, the accused has narrated the details as to how the incident has taken place. The victim has stated that his mother, neighbour Govindbhai, cousin brother Lakha Rambhai have brought him to the hospital. Regarding the motive, he has categorically

stated that since his step father does not like him, he has done all these things. He has stated in his dying declaration that in past also, he used to beat him but as he was his father, he never made any complaint to that effect. Dying declaration supports the version given in the FIR Ex.21, deposition of complainant Savitaben Ex.20 and also medical evidence of Dr.Dhirendra Pramlal Dhanki, who is the doctor who made both the endorsements on the dying declaration Ex.30 and who has been examined by the prosecution as P.W.17 at Ex.43. He has supported the say of the prosecution and also the say of the Executive Magistrate. He has categorically stated that patient was all throughout conscious and was able to give dying declaration. Law on the point of dying declaration is clear that if dying declaration is trustworthy and free from doubts, then conviction can be based only on the said dying declaration and it does not require any corroboration. Keeping in mind the above principle, we are of the opinion that the

dying declaration is trustworthy and it has been recorded by taking care and caution by the Executive Magistrate and nothing has come out in the cross examination of Executive Magistrate which shake his evidence.

9.It is established from the evidence on record that present victim was the step son of the appellant, who came along with his mother at the age of 10 and was staying with the appellant. At the time of incident, the victim was 25 years of age. It is established that appellant was insisting the victim to leave the house and go to his real father but the victim did not like to leave his mother and that is the cause leading to the offence under Sec.302 IPC. Hence, motive as to the commission of offence has also been proved by the prosecution.

10.It is clear that the incident has been taken place at midnight and that too in the house where appellant, victim and complainant Savitaben were residing together and hence, in normal circumstances, they all would be present

at the residence. Not only that, all of them received burns injuries and it has been proved by the prosecution by examining doctor who treated them in course of his duty. It is also clear that Savitaben received grievous injuries which injury, as per the victim in his dying declaration, has been caused while his mother was trying to save him after his father (appellant herein) set him on fire by pouring kerosene on him. The victim also stated in the dying declaration that at that time, his step father was shouting that he would kill both of them. The presence of the appellant is also established from the fact that he received various injuries and it has been proved by way of arrest panchnama of the appellant accused Ex.10. In view of the above, presence of the appellant at the scene of offence is fully established. There is no possibility of misidentification of the accused because the victim, complainant and the accused are all relatives and staying together. There is no question of falsely involving the accused also

because the prosecution is able to establish the motive against the crime i.e. the appellant does not like the victim and was asking him to go to his real father and the victim was unwilling to go. Thus, along with the presence, motive for the commission of offence is also established. Hence, prosecution is able to prove the case against the appellant beyond reasonable doubt on the basis of evidence of doctor who has examined all the three persons and also through the evidence of Executive Magistrate. Over and above, prosecution has also proved cause of death by way of post mortem report Ex.24 and also through the evidence of Dr.Ashokkumar Laxmidas Samani, P.W.7 Ex.23, who performed post mortem on the dead body of the deceased. In view of the above, we are of the view that this is not a case for admission.

11.As regards the point of sentence, we have gone through the impugned judgment and order of conviction. Once charge under Sec.302 IPC against the present appellant has been proved

by the prosecution and court below has awarded minimum sentence prescribed, we are unable to interfere with the same and for which, no support of any judgment is required. Still, however, we rely upon (2006) 3 Supreme Court Cases 771 in the case of Dinesh @ Buddha Vs. State of Rajasthan wherein it has been held by the Apex Court at head note "C" as under:

"C. Penal Code, 1860, Ss.376(2)(f)--Applicability of proviso to S.376(2)--Rape on child below 12 years of age--Imposition of sentence below the prescribed minimum of 10 years--Held, normal sentence in such case is not less than 10 years--Courts are obliged to respect the legislative mandate in this regard--Recourse to the aforesaid proviso can be had only for "special and adequate reasons" and not in a casual manner--Whether there exist any "special and adequate reasons" would depend upon a variety of factors and the peculiar facts and circumstances of each case--No hard-and-fast rule of universal application can be laid down in this respect."

12. In view of the aforesaid, we are of the opinion that no illegality has been committed by the court below in the impugned judgment warranting interference by this Court in the present appeal. Hence, this appeal is required to be dismissed at admission stage.

13.We are not discussing the evidence of each witness in detail in view of the observations made by the Hon'ble Apex Court in the case of STATE OF KARNATAKA VS. HEMAREDDY reported in AIR 1981 SC 1417 which reads as under:-

"..... This court has observed in Girija Nandini Devi V. Bigendra Nandini Chaudry(1967) 1 SCR 93: (AIR 1976 SC 1124) that it is not the duty of the appellate court when it agrees with the view of the trial Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

14.In view of the above, this appeal is required to be dismissed.

15.This appeal is dismissed.

16.In view of the dismissal of appeal filed by the original accused, Criminal Misc. Application No.12172 of 2006 for bail does not survive and is disposed of accordingly.

(R.P.DHOLAKIA, J.)

(M.D.SHAH, J.)

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